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BRIEFS

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No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.
AND JACK C. PHILLIPS,

Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,

Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Will our society honor the guarantees of the Free Exercise Clause when a religious practice is based upon a moral judgment that is anathema to the contemporary *zeitgeist*?

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INTEREST OF *AMICUS CURIAE* AGUDATH ISRAEL OF AMERICA[1]

Agudath Israel of America ("Agudath Israel") is a 94-year-old Orthodox Jewish organization, with members and constituent religious bodies – including a national network of some 40 Agudath Israel-affiliated synagogues – across the United States.

Agudath Israel regularly intervenes at all levels of government – federal, state and local; executive, legislative, administrative and judicial (including through the submission of, or participation in, *amicus curiae* briefs in this Court) – to advocate and protect the interests of the Orthodox Jewish community in the United States. Agudath Israel is particularly assiduous in seeking to prevent any governmental action that, inadvertently or otherwise, might restrict the ability of Orthodox Jews to practice our religion freely, or to participate fully and equally in the public life of our country.

In this case, the court below ruled that the State of Colorado may compel a Christian baker to design and produce a cake to celebrate the marriage of two men, notwithstanding that such a marriage is abhorrent to that baker's religious beliefs. The State of Colorado would thus deny that baker the right to live and conduct his business in accordance with his core religious beliefs. The State of Colorado presumes to do this

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for a party authored this brief in whole or in part; and no counsel for a party or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members or its counsel made such a monetary contribution.

because it deems the baker to be discriminating on the basis of sexual orientation. [2]

Agudath Israel of America respectfully submits this *amicus curiae* brief in support of that baker, because the decision below would also bar Orthodox Jews from living and conducting our businesses in accordance with our core religious beliefs.

Jewish law (in Hebrew, "*halacha*"; literally, "the way to go") is a corpus that begins with, and is founded upon, a Written Law and an Oral Law that were revealed by God to the Jewish people at Mount Sinai and subsequently during our travel from Egypt to the Land of Israel. Jewish law does not limit itself to religious practices as that term is generally understood, but also governs every aspect of day-to-day life. For example, Jewish law includes tort law, contract law, other aspects of business law, and family law. It governs what Jews may and may not eat, how we may and may not dress, how to behave toward our spouses and raise our children, and every other aspect of our

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[2] We do not understand why the petitioners' refusal to design and bake a cake for a celebration of the marriage of two men constituted discrimination on the basis of the individual respondents' sexual orientation. The petitioners refused to design and bake the cake not because of the individual respondents' sexual orientation, but because of their intended use for the cake. Had they wanted a birthday cake, the petitioners would have designed and baked it, notwithstanding the respondents' sexual orientation. Indeed, the absence of discrimination on the basis of respondents' sexual orientation is demonstrated by the fact that the mother of one of the respondents – presumably a heterosexual woman – was treated exactly the same as the two homosexual respondents. We recognize, however, that this Court is bound by the lower court's interpretation of Colorado law.

lives, in public and in private, at work, in the street, and at home.

Jewish law unequivocally prohibits and condemns homosexual practices. C. Rapoport, *Judaism and Homosexuality* 1-5 (2017). Jewish law also prohibits aiding and abetting forbidden practices. It is, therefore, quite likely that an Orthodox Jewish baker would refuse to design and bake a cake for an event celebrating a marriage of two men, and it is likely that an Orthodox Jewish caterer would refuse to prepare food for it, and that Orthodox Jewish photographers, musicians, printers, florists, etc. would refuse to provide their services.

These are not the only circumstances in which the decision of the court below would bar Orthodox Jews from living and conducting their businesses in accordance with our core religious beliefs. For example, because of Jewish law's prohibition of intermarriage, many Orthodox Jewish caterers, and other Orthodox Jewish service providers, would not service a wedding of a Jew and a non-Jew.

All of this would apparently be unlawful discrimination in the eyes of the Colorado Civil Rights Commission and the Colorado Court of Appeals. They would permit the state to force Orthodox Jews to cater marriages of Jews and non-Jews, because they would otherwise find discrimination on the basis of religion, notwithstanding that this would compel Orthodox Jews to violate their core religious principles. Indeed, under the reasoning of the court below, the state could even force an Orthodox rabbi to preside at a wedding of two men, or of a Jew and a non-Jew.

We respectfully submit that giving the state this power is irreconcilable with the Free Exercise Clause, and that the decision of the Colorado Court of Appeals must be reversed.

SUMMARY OF ARGUMENT

Our argument was summarized by Justice William J. Brennan, Jr., 56 years ago: "[T]he issue in this case . . . is whether a State may put an individual to a choice between his business and his religion. . . . [S]uch a law prohibits the free exercise of religion." *Braunfeld v. Brown*, 366 U.S. 599, 611 (1961) (Brennan, J., concurring and dissenting).

ARGUMENT

Not long ago, this case would have been inconceivable, even as a law school exam hypothetical. Until very recently, the moral values of America were generally consistent with the moral values reflected in Jewish law. This is no longer true, particularly with respect to sexual activities. Jewish law prohibits and condemns all sexual activity outside marriage, but America today is quite accepting of sexual activity outside marriage, both premarital and extramarital. No one, however, is trying to force Orthodox Jews to endorse or participate in celebrating heterosexual activities outside marriage.

American society has also changed radically, in a very short period of time, its moral judgment concerning homosexual activities. Not long ago, this Court held that a Georgia law criminalizing sodomy was constitutional. *Bowers v. Hardwick*, 478 U.S. 186 (1986); seventeen years later, this Court held that state sodomy laws are unconstitutional. *Lawrence v. Texas*, 539 U.S. 558 (2003). In 1996, Congress enacted and President Clinton signed The Defense of Marriage Act ("DOMA"), Pub.L. 104–199, 110 Stat. 2419, 1 U.S.C. § 7 and 28 U.S.C. § 1738C, which defined marriage for federal purposes as the union of one man and one woman, and allowed states to refuse to recognize same-sex marriages granted under the laws of other states. It was passed in the House by a vote of 342-67, and in the Senate by a vote of 85-14, reflecting a moral consensus of American society. Nonetheless, just seven years later, this Court held that DOMA was unconstitutional, *United States v. Windsor*, 570 U.S. ___ (2013); and two years later, this Court held that there is a constitutional right to same-sex marriage. *Obergefell v. Hodges*, 576 U.S. ___ (2015).

Nothing in the Constitution changed between the *Bowers* decision in 1986 and the *Obergefell* decision in 2015. The contemporary *zeitgeist*, however, had made a 180 about-face. Among the intellectual and philosophical opinion-shapers of America, a consensus formed that homosexual activities are just another type of sex, and that same-sex "marriage" is just a marriage. While U.S. constitutional law may have this flexibility, Jewish law, based upon the divinely revealed Written Law and Oral Law, in immutable. Thus, under Jewish law, homosexual activities remain an abomination, and a marriage of two men remains inconceivable.

We recognize that our values in this area are out of sync with those of 2017 America. We believe that America has made a grievous mistake, but that is beside the point now. All we seek here, and all that we say the Free Exercise Clause requires, is to be allowed to continue to live our lives in accordance with Jewish law.

First Amendment law, including concerning the Free Exercise Clause, has reached a level of legal formalism that would probably amaze, but greatly please, Dean Langdell. The Court has constructed a complex matrix for interpreting the First Amendment, involving neutrality, general application, strict scrutiny, reasonableness, etc. The petitioners have applied this matrix with respect to the Free Exercise Clause, and shown that the decision below is wrong. Brief for Petitioners at 38-60. While we might phrase some of their arguments slightly differently, we have no substance to add to them, and will not burden the Court with a repetition.

Rather, we ask the Court to step back, and consider this case from a broader perspective. In light of the

Free Exercise Clause, may the State of Colorado force an Orthodox Jewish caterer to cater a reception celebrating the marriage of two men, or of a Jew and a non-Jew, notwithstanding that this would force the caterer to violate his core religious belief that doing so would aid and abet prohibited conduct? In thinking about this question, we urge the Court not to follow various other liberal democracies that do not have a Free Exercise Clause and are placing substantial obstacles in the way of Orthodox Jews who wish to live according to Jewish law.

For example, Jewish law strictly limits the species of animals that may be eaten (that are "*kosher*"), but even those animals may not be eaten unless they are slaughtered in a very specific manner which is defined in Jewish law ("*shechitah*". Belgium, Denmark, New Zealand, Norway, Switzerland and Sweden all ban *shechitah*, and the United Kingdom has seriously considered doing so. *See Legal aspects of ritual slaughter, Sept. 6, 2017* https://en.wikipedia.org/wiki/Legal_aspects_of_ritual_slaughter.

Also in the United Kingdom, earlier this year, an Orthodox Jewish primary school for girls failed an inspection by the Office for Standards in Education, Children's Services and Skills ("Ofsted"), because, *inter alia*, "Pupils are not taught explicitly about issues such as sexual orientation. This restricts pupils' spiritual, moral, social and cultural development and does not promote equality of opportunity in ways that take account of differing lifestyles. As a result, pupils are not able to gain a full understanding of fundamental British values." Ofsted, *School progress monitoring inspection report, Vishnitz Girls School, 10 May 2017* at 2, https://reports.ofsted.gov.uk/inspection-reports/find-inspection-report/provider/ELS/138516. This was

a violation notwithstanding that "The school's culture is . . . clearly focused on teaching pupils to respect everybody, regardless of beliefs and lifestyle." *Id.*

For another example, Jewish law requires circumcision of male babies on the eighth day of their lives, except in certain special circumstances where this might endanger the life of the baby. On October 1, 2013, the Parliamentary Assembly of the Council of Europe adopted a resolution stating they are "particularly worried about a category of violation of the physical integrity of children," including "circumcision of young boys for religious reasons." Parliamentary Assembly, Council of Europe, *Children's Right to Physical Integrity*, Resolution 1952, Adopted at Strasbourg, October 1, 2013. In May 2012, the Cologne, Germany, regional appellate court ruled that religious circumcision of male children amounts to bodily injury, and is a criminal offense in the area under its jurisdiction. Seven months later, the German national legislature reversed this decision by enacting a federal law that permits non-therapeutic circumcisions to be performed under certain circumstances. German Civil Code §1631(d). Throughout Western Europe, various medical groups have advocated banning the circumcision of infants.

None of these jurisdictions has a Free Exercise Clause. This makes all the difference in the world. In 2012, New York City adopted a regulation that regulated an aspect of Jewish ritual circumcision. In a lawsuit brought by a number of plaintiffs, including Agudath Israel, the district court refused to issue a preliminary injunction against enforcement of the regulation after a "rational basis" review, but the Second Circuit reversed, holding that the regulation was neither neutral nor generally applicable, and therefore

subject to strict scrutiny. *Central Rabbinical Congress v. New York City Department of Health & Mental Hygiene*, 763 F.3d 183, 186 (2014). New York City withdrew the regulation before the district court could reconsider its decision using the proper standard.

We understand that the State of Colorado considers it to be very important to prevent discrimination on the basis of sexual orientation. We submit, however, that no matter how important the State deems this goal to be, it should not be permitted to overrule the Free Exercise Clause. Nothing is more important than providing for the national defense, but from the beginning, our country has excused from military service those who object on religious grounds. In September 1789, President Washington wrote to the Annual Meeting of Quakers:

> Government being, among other purposes, instituted to protect the persons and consciences of men from oppression, it certainly is the duty of rulers, not only to abstain from it themselves, but, according to their stations, to prevent it in others.
>
> The liberty enjoyed by the people of these states of worshiping Almighty God agreeably to their consciences, is not only among the choicest of their *blessings*, but also of their *rights*. While men perform their social duties faithfully, they do all that society or the state can with propriety demand or expect; and remain responsible only to their Maker for their religion, or modes of faith, which they may prefer or profess.
>
> Your principles and conduct are well known to me; and it is doing the people called

> Quakers no more than justice to say, that (except their declining to share with others the burden of the common defense) there is no denomination among us, who are more exemplary and useful citizens.
>
> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

G. Washington, *Letter to the Annual Meeting of Quakers*, September 1789, http://teachingamericanhistory.org/library/document/letter-to-the-annual-meeting-of-quakers/. President Washington obviously did not appreciate the Quakers' "declining to share with others the burden of the common defense", but he accepted this as necessary "to protect the persons and consciences of men from oppression." If conscientious objection to participating in the common defense can be respected, certainly conscientious objection to designing and baking a wedding cake to celebrate a marriage of two men can be respected.

For millennia, Jews have professed and lived by beliefs out of sync with, and often anathema to, those of society at large. Over three thousand years ago, the very first Jews, Abraham and Sarah, rejected the contemporary notion that statues of clay were gods to be worshipped. When a large part of the world in which we lived officially accepted Jesus as the messiah, we dissented; and when another large part of the world officially accepted Mohammed as a prophet, we dissented again.

We also have millennia of experience with paying a high price for holding fast to our religious beliefs. Indeed, by the standards of the Twentieth Century, merely not being able to function as caterers without violating our consciences might be considered relatively benign.

But this country has been exceptional from its inception. The Massachusetts Bay Colony was founded by Puritans who fled England because they had been persecuted because their core religious beliefs conflicted with contemporary mores. Even before the First Amendment was ratified, President Washington wrote to the Orthodox Jewish congregation in Newport, Rhode Island:

> The citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy — a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship.
>
> It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.
>
> * * * * *
>
> May the children of the stock of Abraham who dwell in this land continue to merit and enjoy the good will of the other inhabitants – while

> every one shall sit in safety under his own vine and fig tree and there shall be none to make him afraid.
>
> May the father of all mercies scatter light, and not darkness, upon our paths, and make us all in our several vocations useful here, and in His own due time and way everlastingly happy.

G. Washington, *Letter to the Hebrew Congregation at Newport*, August 21, 1790, http://teachingamericanhistory.org/library/document/letter-to-the-hebrew-congregation-at-newport/. And the First Amendment guarantees free exercise to people of all religions.

As we have previously argued to this Court, in the aftermath of *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Free Exercise Clause offers little if any comfort to individuals whose religious faith requires them to engage in conduct deemed unlawful discrimination under generally applicable provisions of secular law if a state may punish them for practicing their faith. *See Christian Legal Society v. Martinez* (No. 08-1371), Brief of Agudath Israel of America as *Amicus Curiae* in Support of Petitioner, Feb. 4, 2010; *Boy Scouts of Am. v. Dale* (No. 99-699), Brief of Agudath Israel of America as *Amicus Curiae* in Support of the Petition, Nov. 26, 1999.

The United States has been a unique haven for the Jewish people, unlike any other non-Jewish society. We have never been banned or expelled. We are able to live according to Jewish law, in private and in public. Orthodox Jews have served, and are serving, at the highest levels of our federal, state and local governments. All this reflects a realization of the Free

Exercise Clause. On the other hand, the foreign bans and proposed bans on ritual circumcision and *shechitah* indicate where we might be going if the Court continues further down the path of *Smith*, *Boerne* and *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010). We continue to believe that *Smith* was incorrectly decided, and that any statute which bans a *bona fide* religious practice must be reviewed under the standard of "strict scrutiny." But the court below went beyond *Smith*, and held that a state has the power to force a religious believer to perform an act that would cause him to violate his core religious beliefs. We urge the Court to consider carefully the broad implications of the decision below, and not to follow the court below down its further extension of the *Smith* path.

The court below disregarded foundational principles by permitting a state to punish a religious believer because he adhered to his core religious beliefs by refusing to do something that was anathema to him. This suggests that Orthodox Jews, and all other followers of traditional religions, could be punished for adhering to our core religious beliefs. We implore the Court to reject this evisceration of the Free Exercise Clause.

CONCLUSION

Agudath Israel of America respectfully urges the Court to reverse the decision of the Colorado Court of Appeals.

Respectfully submitted,

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